IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

MONDAY, THE 1ST JANUARY 2007 / 11TH POUSHA 1928

CRL.A.No. 1128 of 2006(B)

SC.787/2001 of ADDL. SESSIONS COURT (ADHOC), TRIVANDRUM

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APPELLANT:

SASIDHARAN,
C.NO.9929,
CENTRAL PRISON,
THIRUVANANTHAPURAM-695 012.

BY ADV. ADV.LIJU V STEEPHAN(STATE BRIEF)

RESPONDENTS:

STATE OF KERALA,
REP. BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR SRI. K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

V. RAMKUMAR, J.

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CRL. APPEAL NO. 1128 OF 2006

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Dated, this the Ist day of January 2007

JUDGMENT

In this appeal preferred from the Central Prison, Thiruvananthapuram, the appellant who was the sole accused in S.C. No. 787/2001 on the file of the Addl. Sessions Judge, Fast Track Court (Adhoc) No. I, Thiruvananthapuram, challenges the conviction entered and the sentence passed against him for an offences punishable under Section 55 (a) of the Abkari Act.

2. The case of the prosecution is that on 15-05-1998 at 5 p.m. while the Excise Preventive Officer (P.W.5) attached to the Excise Office, Kazhakuttom was proceeding on patrol duty along the Panachamoodu-Murukkumpuzhakadavu road they came across the accused carrying a black plastic can having a capacity of 2 ½ litres containing two litres of illicit arrack and that the accused has thereby committed offences punishable under Sections 8(1) and 58 of the Abkari Act.

3. On the accused pleading not guilty to the charge framed against him by the court below for an offence punishable under

Section 55(a) of the Abkari Act, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 6 witnesses as P.Ws 1 to 6 and got marked 5 documents as Exts. P1 to 5 and one material objects as Mo 1.

4. After the close of the prosecution evidence the accused was questioned under Section 313 (1)(b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence. He submitted before Court that he was running a mobile tea stall in the Murukkumpuzhakadavu and was falsely implicated in this case on account of the enmity between his family and that of P.W.5.

5. Since the trial court did not consider this a fit case for recording an order of acquittal under Section 232 Cr.P.C., the accused was called upon to enter on his defence and to adduce any evidence which he might have in support thereof. The accused did not adduce any defence evidence.

6. The learned Addl. Sessions Judge, after trial, as per judgment dated 13-2-2006 found the appellant guilty of the offences charged against him and sentenced him to undergo rigorous imprisonment for 1 ½ years and to pay a fine of Rs. 1,00,000/- and

on default to pay the fine, to suffer rigorous imprisonment for a further period of six months. It is the said judgment which is assailed in this appeal by the sole accused.

7. I heard Advocate Sri. Liju V. Stephen, the learned counsel who defended the appellant on State Brief and Advocate Sri. Sivakumar, the learned Public Prosecutor who defended the State.

8. The only point which arises for consideration in this appeal is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not ?

THE POINT:

9. P.Ws 1 and 6 are the two independent witnesses to the arrest, search and seizure. Both of them turned hostile to the prosecution. While P.W.1 admitted the signature in Ext.P1 contemporaneous mahazar prepared by the detecting officer, P.W.6 denied his signature appearing thereon. P.W.2 is the Excise Guard who accompanied the the detecting officer. P.W.3 who was the Excise Inspector of Kazhakkoottam Excise Range, registered Ext.P2 report. P.W.4 is the successor in office of P.W.3 and it was P.W.4 who filed final report before court. Ext.P3 Chemical Examination report dated 19-06-1999 to the effect that the sample in question contained 13.26 percent by volume of Ethyl Alcohol was proved through

P.W.4.

10. After hearing both sides and after bestowing my anxious consideration to the oral and documentary evidence, I am not satisfied that the prosecution has succeeded in bringing home the guilt of the accused beyond reasonable doubt.

11. It is true that P.Ws.1 and 6 who are the independent witnesses to the arrest, search and seizure turned unfriendly to the prosecution. But that does not in any way affect the core of the prosecution case regarding the arrest, search and seizure in the light of the credible testimonies of P.Ws 2 and 5. Moreover courts are not unfamiliar with such independent witnesses turning disloyal to the prosecution. If the evidence of the detecting officer is free from blemishes and is otherwise trustworthy, his evidence can be believed and acted upon notwithstanding the hostility shown by such independent witnesses. **(See Sivaraman v. State of Kerala - 1981 KLT (SN) 9).** But merely by proving the arrest and seizure, the prosecution cannot expect a conviction for the alleged offence unless it is proved beyond doubt that the liquid in the jerry can allegedly seized from the possession of the accused contained illicit arrack Even though the properties seized by P.W.5 from the accused reached the court on 16-5-1998, admittedly, P.W.5 had not drawn

any sample from the alleged contraband liquor contained in the jerry can said to have been carried by the accused. Neither P.W1 nor P.Ws 3 and 4 who were in-charge of the investigation had made any requisition to the court to draw samples from the jerry can produced in this case on 16-5-1998. No forwarding note also was submitted before court requesting the Magistrate to take sample from the jerry can and forward it to the chemical examiner for analysis. It is not known whether the committal Magistrate was taking sample suo moto without any request by the prosecuting agency and was despatching the same to the chemical examiner. Ext. P3 chemical examination report shows that a sample containing about 200 ml. of a clear and colourless liquid was despatched from J.F.C.M. - II, Attingal as per letter dated 25-9-1998. It is not known as to whether the said sample was drawn from the said jerry can, allegedly seized from the accused and produced before court. Even if the said sample was drawn from the jerry can there is no evidence to show who drew the sample and on what date. There is also no evidence before court to show the date of despatch of the sample . In a case of this nature the prosecution can succeed only if it establishes that the sample which had changed several hands had ultimately reached the hands of the chemical examiner in a tamper proof condition and that it was

the same sample which was drawn from the contraband liquor allegedly seized from the accused. ***(Vide State of Rajasthan v. Daulat Ram - AIR 1980 SC 1314 and Valsala V. State of Kerala - 1993 (2) KLT 550 SC).***

11. In this case there is absolutely no link evidence to establish that a sample was drawn from the jerry can allegedly seized from the accused and that the said sample reached the hands of of the chemical analyst in a tamper proof condition. The conviction recorded and the sentence passed by the court below overlooking the above vital aspects cannot be sustained and are accordingly dislodged.

12. The appellant is found not guilty of the offence punishable under Sec. 55(a) of the Abakri Act and is acquitted thereunder. He is set at liberty. He shall be released from prison forthwith unless his continued detention is needed in connection with any other case.

In the result, this Criminal Appeal is allowed as above.

V. RAMKUMAR,
(JUDGE)

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V. RAMKUMAR, J.

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CRL. APPEAL NO. 1128 OF 2006

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Dated, this the
1st day of January 2007

JUDGMENT